STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 23, 2012
v	No. 301482 Wayne Circuit Court
RICHARD LEE CURRIE, Defendant-Appellant.	LC No. 10-000967-FH

Before: GLEICHER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Following a bench trial that began before Wayne Circuit Court Judge Ulysses S. Boykin and was completed by Wayne Circuit Court Judge Robert B. Brzezinski, defendant was convicted of second-degree home invasion, MCL 750.110a(3). He was sentenced as an habitual offender, third offense, MCL 769.11, to a prison term of 6 to 30 years. He appeals as of right. We affirm.

On September 13, 2010, the parties appeared before Judge Boykin, and defendant waived his right to a jury trial. When Judge Boykin asked defendant if anyone had threatened or promised him anything in exchange for his waiver, defendant stated, "I would think it was a threat if they said I couldn't hold it in front of you, that I would have to go to another unfamiliar judge." Judge Boykin explained to defendant that if he were to waive a jury, "it could go somewhere else or it could stay here, but it just wouldn't have a jury hear your case, if you waive it." Judge Boykin again asked defendant if any threats or promises had been made to induce him to waive a jury and defendant responded negatively. Judge Boykin found that defendant's jury waiver was knowingly and voluntarily made.

After the jury waiver, Judge Boykin inquired, "All right. This is not going to spin today, Madam Clerk?" The clerk responded, "No. It's going to stay in front of you, Judge Boykin." The parties discussed their availability for a new date and agreed on October 6, 2010. Judge Boykin suggested, "we can put this trial in progress, then if you both want to reserve your opening statements today?" Defense counsel stated that she was going to waive her opening statement. The prosecutor stated that she had no objection. The trial court responded, "Okay. So, we're in progress then – until 9:00 A.M., Wednesday, October the 6th."

On October 6, 2010, the parties appeared before Judge Brzezinski. The prosecutor explained:

> We were scheduled for a trial in front of Judge Boykin today that is a bench trial. And on the previous date, approximately – it was a few weeks ago, Judge, the Defendant waived the jury and this became a bench trial in front of Judge Boykin. We then—we waived our opening statements, so we were in progress already this morning; this case was spun to this courtroom. I believe, and defense counsel can perhaps provide more information, that the Defendant was objecting to a bench trial in this courtroom. Based on that information, we took the file back down to Judge Boykin, we talked to Judge Boykin because we were concerned that perhaps on the record last time we were in there, there were some promises or assurances made.
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> Now, I don't believe that Judge Boykin explicitly promised the Defendant that this trial would be in front of him but I think some things were said that may put it—may have given him that impression. I can't speak for him; defense counsel can tell you more. But we did talk to Judge Boykin; Judge Boykin assured us that no promises were made, this case was spun, he's currently in trial right now, jeopardy has not attached and that is our position. We did not swear any witnesses and we are ready to proceed today.

In response, defense counsel stated:

> Your Honor, the prosecutor did state it fairly correctly. At the time that we did waive, Judge Boykin along with the clerk did say on the record that our case would be heard in his courtroom. Obviously the judge did not promise us that the case would be heard there but certainly we have an objection where the impression is given that a case will stay in front of a judge after it's already been spun and defense counsel, along with the prosecutor, along with the Defendant are told this is where the case is going to be heard, and then waived our opening and, again, we're in progress. Just for the record we want to assert our objection to having this case heard outside of Judge Boykin's courtroom.

Judge Brzezinski responded:

> Well, the whole thing snags [sic] of judge shopping. I'm sure when I'm on the bench I tell people you're going to have a trial and they assume it's going to be before me but it could be before anybody. So, your objection's been noted. You may make your opening statement or waive it, whatever you want to do.

At the conclusion of the proofs, Judge Brzezinski found defendant "guilty beyond all doubt."

Defendant now argues that the substitution of judges did not comply with MCR 6.440(B). Although defendant objected below to the case being heard outside of Judge Boykin's courtroom, he did not rely on or even refer to MCR 6.440(B). Instead, his objection was premised on statements that allegedly gave defendant the impression that his case would be heard by Judge Boykin. "An objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground." *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Because defendant's objection at trial was premised on statements

allegedly made during the jury waiver, whereas defendant's arguments on appeal concern compliance with a specific court rule, the issue is unpreserved.

We review the interpretation and application of a court rule de novo as a question of law. *Id*. at 308-309. However, we review an unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). As explained in *Carines*:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*Id*. (citations omitted).]

MCR 6.440(B) addresses disability of a judge during a bench trial. It states:

> **During Bench Trial.** If a judge becomes disabled during a trial without a jury, another judge may be substituted for the disabled judge, but only if
>
> (1) both parties consent in writing to the substitution, and
>
> (2) the judge certifies having become familiar with the record of the trial, including the testimony previously given.

The parties do not address whether Judge Boykin's unavailability rendered him "disabled." Assuming arguendo that he was "disabled," the requirements for substitution were not satisfied because defendant did not consent in writing to the substitution and Judge Brzezinski did not certify that he was familiar with the record of the trial.

Rules of automatic reversal are disfavored. *People v McCline*, 442 Mich 127, 134 n 10; 499 NW2d 341 (1993). Indeed, defendant does not argue that a violation of the court rule is grounds for automatic reversal. Rather, citing *McCline*, defendant argues that he is entitled to a new trial because he was prejudiced by the substitution. See also *People v Bell*, 209 Mich App 273, 275; 530 NW2d 167 (1995). Defendant asserts that he was prejudiced by the substitution because "he waived his right to a jury trial believing that Judge Boykin would be presiding over the trial" and his "decision to waive the jury clearly depended upon the judge who would preside over the trial."

The record does not support defendant's claim that he waived his right to a jury in reliance on assurances that he would be tried before Judge Boykin, or even in reliance on any statements that were reasonably likely to lead him to believe that he would be tried before Judge

Boykin. Although defendant's statements during the jury-waiver proceedings suggested that he wanted to be tried before Judge Boykin, Judge Boykin clearly explained to him that "if you waive the jury, it could go somewhere else or it could stay here, but it just wouldn't have a jury hear your case, if you waive it." After having been informed that his case could be heard by another judge, defendant elected to proceed with his jury waiver and acknowledged that no threats or promises had been made to induce him to waive a jury. Thus, the record does not support defendant's claim of prejudice.

In *McCline*, 442 Mich at 132, the Supreme Court explained that "'the rule against substitution is designed to insure that the judge who hears the testimony as to the facts also applies the law thereto'" (citation omitted). Here, no testimony was presented before the substitution. Judge Brzezinski gave both parties another opportunity to present opening statements, he heard all testimony that was presented at the trial, and he issued findings of fact and conclusions of law. Under the circumstances, there is no basis for concluding that defendant was prejudiced by the substitution. Appellate relief is not warranted.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Patrick M. Meter
/s/ Pat M. Donofrio